

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76124

AT AUCKLAND

Before:

S L Murphy (Member)

Counsel for the Appellant:

H Ratcliffe

Appearing for the Department of Labour:

No Appearance

Date of Hearing:

11 October 2007

Date of Decision:

19 November 2007

DECISION

[1] This is an appeal against the decision of a refugee status officer of the Department of Labour (DOL), declining the grant of refugee status to the appellant, a national of Nepal.

INTRODUCTION

[2] The appellant arrived in New Zealand on 20 November 2004 and lodged his first claim for refugee status on 18 February 2005. He was interviewed by the RSB on 11 April 2005 and a decision declining his application on grounds of credibility was delivered on 26 May 2005. He did not appeal that decision. On 14 July 2005, he was given notice that his temporary permit was to be revoked on 5 August 2005. On 14 September 2005, he appealed to the Removal Review Authority ("RRA") claiming that exceptional circumstances of a humanitarian nature made it unjust or unduly harsh for him to be removed from New Zealand. On 6 March 2007, the RRA delivered a decision declining his application.

[3] Following receipt of his RRA decision, the appellant lodged a second application for refugee status on 22 March 2007. He was interviewed by the RSB on 10 May 2007 and a decision declining jurisdiction to hear his application was

delivered on 28 June 2007. It is from that decision that he has appealed to this Authority.

[4] Counsel provided written opening submissions and country information on 9 October 2007, written closing submissions and further country information on 29 October 2007 and further emails and country information on 8 November 2007. These have been taken into account in this decision.

[5] It is noted that counsel was given leave at the end of the hearing to submit, by Monday 29 October, closing submissions together with a translation of a police document that she intended to obtain from the appellant's previous counsel, Dawn Patchett. When the submissions were provided, on 29 October, counsel advised that Mrs Patchett had yet to provide the translation of the police report, but that it was expected to arrive that week. By Wednesday the following week (7 November), the document had not been provided and there had been no further communication from counsel. The Authority wrote to counsel providing her until the end of that week (9 November) to provide the translation, and advising that the Authority would proceed to determine the appeal in the event that it was not forthcoming. Ms Ratcliffe wrote to the Authority the following day (8 November) and advised that she had passed the fax on to Mrs Patchett. Mrs Patchett then telephoned the secretariat to advise that she would try to send in the translation by that date. The translation was, however, not forthcoming. In an abundance of fairness, the Authority waited a further week for the document to be submitted. However, in the absence of the translation or any further communication from Ms Ratcliffe or Mrs Patchett, the Authority proceeded to determine the appeal.

JURISDICTION TO CONSIDER SECOND CLAIM TO REFUGEE STATUS

[6] Section 129J of the Immigration Act 1987 ("the Act") sets out the circumstances in which a refugee status officer may receive and determine a second or subsequent claim to refugee status:

"A refugee status officer may not consider a claim for refugee status by a person who has already had a claim for refugee status finally determined in New Zealand unless the officer is satisfied that, since that determination, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim."

[7] The Authority has jurisdiction to consider appeals in respect of second or subsequent claims by virtue of s129O(1) of the Immigration Act. That section provides:

“A person whose claim or subsequent claim has been declined by a refugee status officer, or whose subsequent claim has been refused to be considered by an officer on the grounds that circumstances in the claimant’s home country have not changed to such an extent that the subsequent claim is based on significantly different grounds to a previous claim, may appeal to the Refugee Status Appeals Authority against the officer’s decision.”

COMPARISON OF CLAIMS

[8] In *Refugee Appeal No 75139* (18 November 2004), the Authority found that:

“Jurisdiction under ss129J(1) and 129O(1) is determined by comparing the previous claim to refugee status against the subsequent claim. This requires the refugee status officer and the Authority to compare the claims as asserted by the refugee claimant, not the facts subsequently found by that officer or the Authority.”

[9] Thus, in order to determine whether the Authority has jurisdiction to consider the appellant’s second claim to refugee status, a comparison of the claims advanced in each claim must first be made.

Claim advanced on first appeal

[10] The appellant’s first claim was based on his fear of Maoists due to his membership of the Tarun Dal political organisation, his marriage to a woman of a lower caste, anti-Maoist political opinions imputed to him in light of his having put posters for his business over Maoist posters, and his work with an NGO. He claimed to have been beaten up by Maoists in 1996 and to have received five telephone threats from them in subsequent years. Government security forces were said to have broken into his home on two occasions in the lead up to his departure.

Claim advanced on second appeal

[11] The appellant’s second claim is based on the following matters. The appellant’s son’s nanny was abducted by Maoists in approximately October 2004 as a warning to the appellant and his family. In April 2007, a newly formed faction of former Maoists who have recently been involved in unrest in the appellant’s home district confiscated the family land. When advising the appellant’s mother that the land had been confiscated, the group warned the family that they must produce the appellant.

[12] The appellant's wife has been receiving telephone threats and been forced to resign from her job.

DECISION ON JURISDICTION

[13] The new claim asserted by the appellant meets the jurisdictional threshold for second or subsequent claims. This is because it involves, on its face, threats and actions against the appellant and his family from a newly formed group manifesting in the confiscation of the family land and associated warning to the family that they must produce appellant. The different source of the threat to the appellant and new incidents amount to "significantly different grounds" affording the Authority jurisdiction to consider the second claim.

THE APPELLANT'S CLAIM

[14] The following summarises the appellant's evidence before the Authority. Its credibility is assessed later.

[15] The appellant was born in AB district. He is a member of the Brahmin caste, the highest caste in Nepal. He completed a Masters degree in 1994 at a major university in Kathmandu. During his university years, he joined the Tarun Dal party, the youth wing of the Nepalese Congress party. He was a district member of the organisation. The party campaigned against communism and in favour of democracy.

[16] After he completed his degree, he returned to his family home in AB and worked for the Tarun Dal party on a voluntary and almost full-time basis for a year. His duties involved campaigning to youth in the area.

[17] In 1996 he returned to Kathmandu, living there until his departure in 2004. He chose to live there rather than his home district because it was the capital and, as an educated person, it provided him with a range of options for advancing his career. Upon his return to Kathmandu, he and some friends opened up the CD Teaching Institute ("the Institute")

[18] The first difficulties the appellant experienced were in 1996 after setting up the Institute. Shortly after opening the Institute the appellant and his business

partners put up posters advertising the Institute at night. The following day the appellant received a call from a member of the Revolutionary Students Forum (“SRF”), which is the student wing of the Maoists. The caller criticised the appellant for putting posters over Maoist posters and demanded Rs500,000 in compensation. The appellant did not have sufficient money so did not make any payment. The appellant responded to the caller by apologising and saying that he had made a mistake.

[19] Subsequent to this incident, the Maoists sent a number of students to the Institute and required them to be taught free of charge. Over the course of the appellant’s time at the Institute, between 10 and 20 Maoist students were taught for free. The appellant’s business partners negotiated the arrangement with the Maoists. The arrangement was clandestine, so it did not result in any difficulties for the Institute.

[20] Approximately a month after that incident, the appellant was returning to his apartment one night when five or six people approached and beat him, causing him to fall to the ground. He still has a scar on his lip as a result of the incident. The appellant was not aware whether the people were Maoists, but he guessed that they were because they said “This is a result of messing with us”.

[21] In 1999, the appellant married a woman from a low cast. The Maoists were unhappy at the inter-caste marriage and this resulted in subsequent problems for the appellant. Around this time he started working part-time at EF, an NGO. In May 2001, the appellant attended the United Nations World Conference Against Racism as delegate for EF in an observer capacity. He was chosen by the EF organisation because of his English language skills. Over time the appellant became more and more involved in EF and, in 2002, he left his job at the Institute and started working for EF full-time. His role in the organisation was a member/secretary, which was in the third tier of the organisation.

[22] The appellant’s duties in EF involved travelling to the seven districts surrounding Kathmandu and educating rural people. He taught villagers basic things such as literacy and how to perform ablutions.

[23] When undertaking his duties, the appellant would encounter Maoist rebels who were very uncooperative as it was unusual for outsiders to come to their region. They threatened him in person and by telephone on very many occasions but never attacked him. Before he left Nepal for Singapore in 2004, they

threatened to harm him physically if he continued to work in remote villages. They also accused him of spying for the government. Maoists also came to his house on several occasions to threaten him.

[24] Some time between 2001 and 2003, Nepalese security forces armed with guns came to the appellant's apartment in the middle of the night on two occasions, approximately a month apart. They searched through his house.

[25] The appellant left Nepal for Singapore in June 2004 for study purposes.

[26] In August 2004 the appellant's uncle was kidnapped by Maoists because he had bought land that formerly belonged to a Maoist leader who wanted it back. He was released after a week after the intervention of an NGO.

[27] On 20 November 2004 the appellant arrived in New Zealand.

[28] Since the appellant's departure from Nepal, his wife has told him that she is repeatedly subjected to threatening calls in person and by telephone in the evenings. Unknown people approach her and ask for the appellant and threaten her, including at the family home. Previously, the callers would advise her that they knew where she worked. These threats caused her to leave her job a year ago.

[29] Approximately a year ago, the appellant's child's teenaged nanny disappeared. Neighbours believe that she was abducted by Maoist rebels.

[30] Seven or eight months ago, the appellant's mother, who is resident in Kathmandu, made her six monthly trip to the family land in AB to gather crops. On previous harvesting trips, she had been allowed access to her crops. However, she was approached when attempting to harvest the crops and told that the crops belonged to someone else. She was also asked where the appellant was and told that she must produce him. She was advised by others that the person who had approached her was a Maoist. The appellant later learned that the land had been taken by a new faction of former Maoists operating in AB.

DOCUMENTS

[31] The appellant has submitted the following documents in the course of his applications before the RSB, RRB and RSAA:

- a. a letter from the president of EF certifying that the appellant was a member of the organisation and that he attended the World Conference Against Racism;
- b. a letter from the Office of District Administration, AB area, dated 22 August 2005;
- c. a letter from the Superintendent of Police, AB area, dated 20 August 2005
- d. a letter from the Chairman of the "Association of the Sufferers from the Maoist Nepal", dated 5 July 2005;
- e. a membership card from the "Association of the Sufferers from the Maoist Nepal";
- f. a photocopy of the appellant's passport;
- g. a letter dated 29 January 2007 from wife's employer certifying that she worked there from 16 July 1996 to 27 October 2006 and left due to "her personal problem";
- h. a translated copy of newspaper article dated 2 April 2007;
- i. country material;
- j. a written statement for RRA application dated 14 September 2005;
- k. a written statement for second refugee claim dated 9 May 2007; and
- l. emails from the appellant's wife dated 27 January, 4 March and 16 May 2007.

THE ISSUES

[32] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

"... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[33] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

CREDIBILITY

[34] The Authority disbelieves the appellant evidence on account of the major inconsistencies in his rendering of events central to the claim, as well as the implausible content of documents submitted in support of his claim.

Beating

[35] The appellant's evidence of the beating he sustained at the hands of the Maoists in 1996 was different in several respects to previous evidence he had given about the incident. To the Authority, he said that the incident was in 1996, that the people who attacked him did not say who they were, and that he went to a medical health assistant after the incident who put a dressing on his wounds. However, when describing the incident in his statement to the RRA, he said that the incident occurred in 2000, that one of the attackers told him that they belonged to the SRF (ie. the student wing of the Maoists), and that he did not require any medical treatment. He also made no reference to the beating in his written statement prepared for his second appeal, in spite of the fact that the statement detailed (indeed referred almost exclusively to) the events that occurred during his time in Nepal. When these discrepancies were drawn to his attention, the appellant responded that he "might have forgotten" that an attacker had identified himself as belonging to the SRF, that when saying he did not obtain medical treatment he had meant that he was not admitted into hospital, and that he "forgot the time". When the Authority pointed out that there were also major inconsistencies in his evidence before the RSB on his first claim as to the timing of this event, given that he had said in his interview that the beating occurred in 2000 and in his written response to the interview report that it occurred in 1996, he responded that he had problems in converting Nepalese dates to English dates. We do not accept this excuse as he did not have similar difficulties in recounting other dates in his evidence (other than one matter referred to below, which for the reasons articulated we do not accept resulted from differences between the Nepalese and Western calendar).

[36] In his second Confirmation of Claim for Refugee Status, the appellant described the beating, and then said "Since they attacked on me, I started leaving in different places because of the security reason" [sic]. However, when subsequently asked by the Authority whether he took any precautions to avoid difficulties after the attack, he referred only to checking carefully what was on the walls when doing publicity campaigns. When asked whether he took any bigger lifestyle precautions as a result of the attack, the appellant said "No." When he was then alerted to the contents of his second Confirmation of Claim for Refugee Status, ie. that he had started "leaving in different places" for security reasons after the incident, the appellant's first explanation was that "leaving in different places" meant "staying in different places". This did not resolve the discrepancy. When

the Authority questioned him as to why he had not mentioned that he had stayed in different places when asked if he had taken any precautions after the incident, he responded that he did not consider that to be a “lifestyle matter”, and when questioned further about this he said:

“In one point we have to move one place to another in Kathmandu. Probably at that time I thought that’s going to be precaution for myself, maybe I thought that at the time.”

[37] This does not satisfactorily resolve the discrepancy.

Incident precipitating departure

[38] In his second Confirmation of Claim for Refugee Status the appellant stated

“...the last time [the Maoists] came and pointed the gun to my wife and son and me and told me to leave the place as soon as I could or die.”

[39] He then said that this incident had occurred in June 2004 and indicated that this incident had precipitated his departure later that month.

[40] In spite of the supposed significance of this incident, that is that it precipitated his departure, the appellant failed to make mention of it to either the RSB in respect of his first refugee claim or in his application to the RRA. Indeed in his written statement to the RRA he indicated that an entirely different incident precipitated his departure, namely Nepalese soldiers raiding his apartment in late 2003 (a matter not mentioned in his second confirmation of claim). When the appellant was asked why he had failed to mention the June 2004 Maoist visit to the RSB in his first refugee claim, and to the RRA, the appellant responded by suggesting that the lawyer who represented him for his first refugee claim did not include it in his written statement, in spite of the appellant having “mentioned” “almost everything” to him, because the lawyer was “very busy”. However the appellant did not submit a written statement in his first refugee claim. When the Authority then asked the appellant why he did not mention it to the refugee status officer in his RSB interview on his first claim, he said “I didn’t have any idea what I had to do or not to do at that time that’s why I didn’t mention it.” In explanation for his failure to mention this incident in his written statement to the RRA, he again implied that the lawyer had left it out of the statement, saying that he had mentioned “each and every incident” to the lawyer who had prepared his statement. We do not accept that explanation – the written statement submitted to the RRA is highly detailed, extending to nine pages with seven attachments referenced in the text and does not give any impression of having been hastily or

poorly prepared. Counsel pointed out that the lawyer signed the statement on the appellant's behalf. However this is not considered to be significant as it is apparent from its detailed content that it was prepared in close consultation with the appellant.

[41] It is also noted that, in contrast to his evidence in his second confirmation of claim that Maoists had "pointed the gun to my wife and son and me" in the incident in June 2004 the appellant told the Authority that the Maoists had never threatened his wife and son with weapons. When the Authority pointed out the discrepancy, he responded that they just pointed the gun at him, as head of the family, and that his wife and son were indirectly threatened as a result. We do not accept that explanation. Pointing a gun at the appellant only, in the company of the wife and son, is very different from "point[ing] the gun to my wife and son and me"

[42] The appellant claimed in his written statement prepared for his second appeal that soldiers from the Royal Nepalese Army had broken into his apartment and searched it in late 2003 and early 2004, resulting in him becoming seriously afraid for his life. He indicated that this incident (rather than the June 2004 threat by Maoists referred to in his second Confirmation of Claim) caused him to depart Nepal. When describing this incident to the Authority, the appellant initially could not give a time frame more specific than 2001-2003, and subsequently said that it was five or six months after he returned from the World Racism Conference. He then checked his passport and confirmed that the date he returned from the conference was 3 June 2001. This would put the date of the incident as being November or December 2001. Given the centrality of this event to his account, the Authority finds the discrepancy in these dates (November/December 2001 versus late 2003 and early 2004) most surprising. The appellant said in explanation for the discrepancy that "I already say I have problem with dates". However, the Authority does not accept this explanation as in both versions of his evidence on this matter he anchored the incident to other events, the dates of which are in his passport and are not in dispute, being the date he returned from the conference and the date of his departure from Nepal. We also disbelieve it in light of the different evidence he gave in his Confirmation of Claim for his second claim to refugee status as to the event that precipitated his departure.

Other threats by Maoists

[43] The appellant told the Authority that he was threatened by Maoists in person on many occasions as well as by telephone on many occasions. However, he told the RSB at the interview on his first application that he had never been threatened in person by Maoists. When the Authority pointed this out, he responded by saying:

“I wasn’t guided properly by my previous lawyer and he never told me what I had to say, what I didn’t have to say, I was really misguided.”

[44] In support of his claim to have been at risk from Maoists, the appellant submitted with his RRA application a document purporting to be from the Administrative Officer from the Office of District Administration in AB dated 22 August 2005 stating “our authorities have been informed many times by him and his family regarding Maoist threats and attack to him”. He also submitted a letter purporting to be from the Superintendent of Police in AB stating that the appellant:

“... had filed a complaint regarding Maoist threats and attacks to him in our nearest Police Station as well as to the SP Office, [GH]. We tried our best to provide him security but we couldn’t give him individual security since we don’t have enough force ...”

[45] However, in spite of these documents indicating that he had made a number of complaints to local officials regarding Maoist threats, when questioned by the Authority as to when the last contact he had with government authorities in his home area, he initially responded “I didn’t have any contact with local government authorities back in home town” and subsequently confirmed this twice. He then changed his evidence saying “maybe I did” for Maoist problems, and then changed it further by saying that he sometimes did when working for Tarun Dal.

[46] In addition to the appellant’s mobile evidence regarding contact with the government authorities in AB, the contents of the documents from the Police Superintendent and District Administration regarding his complaints about Maoists are implausible in the context of the account. The appellant said in his oral evidence that at no stage was he ever attacked or threatened by Maoists in his home area and had not lived in his home area from 1996. There is therefore no sensible explanation for his “many complaints” regarding Maoist attacks to the District Administration in his home area recorded in the letter from the District Administration, nor to the Superintendent of Police (in his home area) endeavouring to provide him with individual security, as recorded in the letter from the Police. The appellant attempted to explain the content of these documents by saying that if he wanted to make any complaint to the police, it would have to be through his home town. When then asked whether this meant that even if

attacked in Kathmandu he would need to make the complaint to the police in his home area AB (which is in an entirely different region of Nepal than Kathmandu), he responded “they will file the complaint for the further procedure, I will have to go back to home town”. The appellant provided no objective evidence in support of his assertion as to the procedure for police complaints in Nepal and the Authority disbelieves it. It is nonsensical to suppose that a criminal investigation in one area is routinely instigated in another, possibly remote, area.

Confiscation of family land

[47] The appellant told the Authority that his mother made trips to the family land every six months to harvest the crops and that she had been denied access to the crops for the first time when she made a trip to the land seven or eight months ago. He confirmed that on all previous occasions she had been allowed to take the crops. However, this conflicted with evidence that he had given the RSB in his second interview, namely that “It’s been two, three years that we have not been able to get our crops.” When the Authority alerted him to this inconsistency, he said that they had previously been allowed to gather crops “for survival food only”, saying:

“Last couple of years they gave us only limited crops which we can survive to eat only in morning and evening, they didn’t give us our whole crops.”

[48] However, this explanation is not accepted as it is materially different to the evidence he gave on this matter to both the RSB and the Authority. If the access to the crops had indeed been seriously restricted in that manner, this would have been an obvious matter for the appellant to raise when being questioned by the Authority as to the family’s previous access to the crops.

[49] In support of his claim that the family land was confiscated, the appellant submitted a photocopy of a page from of the *Drishti* (Weekly) newspaper dated 3 April 2007, entitled “Whip to produce [appellant’s surname]”. The article names the appellant and says that his family have been threatened by the former Maoist faction, that he has been in New Zealand since 2003, and that the family have been told by cadres that they can not “even tread on their land in case of their failure to produce [the appellant].” The newspaper in which this article supposedly appeared is a national weekly newspaper. The Authority finds it implausible that, in the context of the ongoing major political issues in Nepal, an article about rebels seeking the appellant would appear in a national weekly newspaper, and rejects the appellant’s explanation that “this is the first case anyone captured land in the

[AB] district.” The article is blatantly self-serving and the copy of the newspaper page is given no weight.

Emails from wife

[50] In counsel’s 8 November letter subsequent to the hearing (sent after her closing submissions), she enclosed a newspaper report and three emails from the appellant’s wife, dated 27 January 2007, 4 March 2007 and 16 May 2007, referring to the capture of the family land, the disappearance of the nanny, and the wife’s resignation from her job because of the Maoists. Several features of the emails gave them the appearance of not being genuine. Firstly, they were written in (not especially proficient) English in spite of the appellant and his wife both being Nepalese. Second, the wife advised him in the 16 May email that his land had been taken, as if for the first time, even though she had already advised him in the 4 March email. Third, the 4 March email said that the land had been captured last week (that is, late February), and yet the newspaper report on the incident was over a month later, on 3 April. Their late appearance is also curious, given their *prima facie* clear corroborative content to the appellant’s second claim. In this regard we note that the appellant has previously claimed refugee status and appealed to the RRA (and has been legally represented throughout) and thus should be well familiar with the importance of documentary evidence to these processes.

[51] In light of the foregoing, we find the emails to have been prepared for the purposes of bolstering the appellant’s claim.

[52] For the above reasons, the Authority rejects the core account of the appellant regarding the harassment and threats experienced by him and his family as untrue. His supporting documents are found to be fabricated.

Counsel’s submissions

[53] The appellant’s counsel has submitted that the appellant’s main fear is from the former faction of Maoists in his home area AB, and has submitted country material about recent unrest in the Terai region, in which AB is one of a number of districts. The Authority notes that the appellant moved from his home area to Kathmandu for career purposes in 1996 and has not lived there since, and that his family now live in Kathmandu. Moreover, the Authority disbelieves his evidence as to the confiscation of the family land and threats against him by the new group, as

well as his other core evidence, and considers that he is not at risk in AB or Kathmandu.

CONCLUSION

[54] There is no evidence before the Authority that could lead to a finding that the appellant has a well founded fear of being persecuted in Nepal. Accordingly, the first framed issue is answered in the negative and the second issue does not arise.

[55] For the above reasons, the appellant is not a refugee within Article 1(A)(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed

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S L Murphy
Member